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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 897

OSAGE TRIBE OF INDIANS AND FRED LOOKOUT, PRINCIPAL CHIEF AND MEMBER OF THE OSAGE TRIBE OF INDIANS, ON BEHALF OF SAID TRIBE AND THE MEMBERS THEREOF, PETITIONERS

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR OF THE UNITED STATES, AND TOM H. FRALEY, TREASURER OF OSAGE COUNTY, PAWHUSKA, OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR HAROLD L. ICKES, SECRETARY OF THE INTERIOR OF THE UNITED STATES, IN OPPOSITION

OPINIONS BELOW

The opinion of the statutory three-judge court (R. 27–39) is reported in 45 F. Supp. 179. The opinion of the court of appeals (R. 54) is reported in 133 F. 2d 47.

JURISDICTION

The judgment sought to be reviewed was entered January 11, 1943 (R. 55). The petition for a writ of certiorari was filed April 8, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States is an indispensable party to a suit seeking to enjoin the Secretary of the Interior from executing an Act of Congress directing him to pay a portion of the royalties from Osage Indian mineral leases to Osage County, Oklahoma.

STATUTE INVOLVED

The relevant portion of the Act of March 3, 1921, c. 120, 41 Stat. 1249, is set out in the Statement, *infra,* p. 4.

STATEMENT

The Osage Tribe of Indians and its chief brought this suit to enjoin the Secretary of the Interior from paying to Osage County, Oklahoma, $1,535.70 out of royalties received from Osage Indian mineral leases. The material facts, as they appear from the allegations of the complaint and from the applicable statutes, may be summarized as follows:

In 1906, Congress provided for the division of the property of the Osage Indian Tribe among its members. Act of June 28, 1906, c. 3572, 34 Stat.

539 (R. 20–24). The lands were allotted to the members of the tribe subject to a twenty-five year restriction upon alienation (sec. 5). However, the rights to oil, gas, coal, and other minerals were reserved to the tribe for twenty-five years, to be leased by the tribal council with the approval of the Secretary of the Interior and under such rules and regulations as he might prescribe (sec. 3). Funds held by the Treasury of the United States for the tribe were to be held in trust by the United States for twenty-five years (sec. 4). The Act directed that these trust funds "shall be segregated as soon * * * as is practicable and placed to the credit of the individual members of the said Osage tribe on a basis of a pro rata division among the members * * *, said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto" (sec. 4, First). Royalties from the mineral leases were to be placed in the Treasury of the United States to the credit of the members and distributed "in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States" (sec. 4, Second), a maximum of $30,000 annually being reserved for an emergency fund (sec. 4, Fourth) and a maximum of $50,000 annually for 10 years being reserved for educational purposes (sec. 4, Third). At the end of the twenty-five year period, the mineral interests were to become the "absolute

property of the individual members of the Osage tribe" (sec. 5).

Since 1906, various additional provisions have been made concerning the funds, the term of the reservation of minerals being extended to 1983, and the period of the trust to 1984 by the Acts of March 3, 1921, c. 120, 41 Stat. 1249; March 2, 1929, c. 493, 45 Stat. 1478, and June 24, 1938, c. 645, 52 Stat. 1034.

In 1921, Congress passed the Act here involved. Act of March 3, 1921, c. 120, 41 Stat. 1249. Section 5 thereof authorized Oklahoma to levy a gross production tax upon oil and gas produced in Osage County and provided also (R. 25):

> * * * That the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to Osage County, Oklahoma, an additional sum equal to 1 per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein: *Provided further,* That the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only.

Over $1,000,000 has been paid under this Act to Osage County for the construction and mainte-

nance of roads and bridges. In 1940, the direction was changed so as to include the payment for roads and bridges in the gross production tax. Act of April 25, 1940, c. 158, 54 Stat. 168 (R. 25–26). There remains some $1,535.70 which has not yet been paid to Osage County under the 1921 Act. Appellants sought to enjoin the Secretary of the Interior from making this payment, alleging that the provision for payment for roads and bridges was unconstitutional. The complaint also requested the calling of a three-judge court pursuant to the Act of August 24, 1937, c. 754, 50 Stat. 751 (28 U. S. C. 380a). (R. 2–8.)

The Secretary of the Interior moved to dismiss on the ground that the United States is an indispensable party (R. 9).[1] The statutory three-judge court was convened and, after argument, remitted the case to the district court, it having concluded that the United States was an indispensable party, and hence no constitutional question requiring action by the three-judge court was presented (R. 27–39).[2] The district court thereupon dismissed the complaint (R. 13). The court of appeals affirmed, adopting the opinion of the three-judge court (R. 54).

[1] The defendant Tom H. Fraley, Treasurer of Osage County, likewise moved to dismiss but on different grounds (R. 9–11). Since the court found that the United States is an indispensable party, it did not pass on Fraley's motion.

[2] No issue is presented here as to the correctness of this remand.

ARGUMENT

The courts below held that *Morrison* v. *Work*, 266 U. S. 481, conclusively determines that the United States is an indispensable party to this suit. That case involved the Chippewa Indians whose lands had been ceded to the United States for the purpose of sale, the proceeds to be held as a trust fund for the Chippewas. Act of January 14, 1889, c. 24, 25 Stat. 642. By six later Acts, changes were made in the method of managing and disposing of the lands and in the disposition of the proceeds.[3] In a suit against the Secretary of the Interior, the Secretary of the Treasury, the Commissioner of the General Land Office, and the Commissioner of Indian Affairs, Morrison sought to enjoin the enforcement of these six Acts on the ground that they unconstitutionally deprived the Chippewas of property rights which had been vested in them individually by the 1889 Act. This Court refused to pass upon the question, saying (266 U. S. 481, 485–486):

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[3] For a more complete statement of the items involved in the *Morrison* case, see the opinion in *Morrison* v. *Fall*, 290 Fed. 306. Three of these Acts related to the disposal of timber lands (Act of June 27, 1902, c. 1157, 32 Stat. 400; Act of May 23, 1908, c. 193, 35 Stat. 268, 272; Act of May 18, 1916, c. 125, 39 Stat. 123, 137). The Act of May 24, 1922, c. 199, 42 Stat. 552, 569, authorized the use of $46,570 of the trust funds for educating the Chippewas, and the Act of March 3, 1921, c. 119, 41 Stat. 1225, 1235, authorized the use of $100,000 to promote the civilization and self-support of the Indians.

> The United States is now exercising, under the claim that the property is tribal, the powers of a guardian and of a trustee in possession. Morrison's contention is that, by virtue of the Act of 1889 and the agreements made thereunder, the ceded lands ceased to be tribal property and the rights of the Indians in the lands and in the fund to be formed became fixed as individual property. The Court of Appeals held this contention to be unfounded. We have no occasion to determine whether it erred in so ruling. *The claim of the United States is, at least, a substantial one.* To interfere with its management and disposition of the lands or the funds by enjoining its officials, would interfere with the performance of governmental functions and vitally affect interests of the United States. *It is, therefore, an indispensable party to this suit.* * * * [Italics supplied.]

The instant case presents an identical situation. The Osage mineral royalties are trust funds which are being administered by the United States. Even if petitioners' contention that the 1921 Act is unconstitutional (Pet. 4, 7, 8) should be sustained, the funds would not be paid to the Indians but would continue to be administered by the United States as trustee (see Statement, *supra*, p. 3). Accordingly, litigation involving disposition of this property inevitably involves the United States and not merely the Secretary of the Interior. Cf. *Naganab* v. *Hitchcock*, 202 U. S. 473; *Goldberg* v. *Daniels*, 231 U. S. 218. For this

reason, *Philadelphia Co.* v. *Stimson,* 223 U. S. 605; *Ickes* v. *Fox,* 300 U. S. 82, and *Barr* v. *Rhodes,* 35 F. Supp. 223 (W. D. Ky), relied upon by petitioners (Pet. 5–7), are irrelevant. All of those cases involved situations in which the Government would have no interest and its officer would be a trespasser if the statute under attack was invalid. As Justice Brandeis stated in the *Morrison* case (266 U. S. at p. 488):

> In other words, the right of the Indians is merely to have the United States administer properly the trust assumed. It resembles the general right of every citizen to have the Government administered according to law and the public moneys properly applied. Courts have no power, under the circumstances here presented, to interfere with the performance of the functions committed to an executive department of the Government by a suit to which the United States is not, and cannot be made, a party.

Upon the assumption that the 1921 Act confiscated the Indian's property,[4] petitioners suggest (Pet. 7) that the decision in *Morrison* v. *Work* should be overruled. However, no attempt is made to demonstrate any error in the reasoning of

[4] One of the principal reasons for passage of the 1921 Act was to provide roads and bridges which would enhance the value of the Indian's lands, particularly by rendering the mineral lands more accessible. S. Rep. No. 704, 66th Cong., 3d sess.; H. Rep. No. 1278, 66th Cong., 3d sess.; H. Rep. No. 1377, 66th Cong., 3d sess. Thus, the 1921 Act was not a "confiscation" of petitioner's property but was an exercise of Congress' guardianship powers for the benefit of the Osages.

that case. The suggestion is based entirely on the supposition that no other remedy exists. But the usual procedure of testing these Indians' claims by suit in the Court of Claims under special jurisdictional Acts is available to petitioners. In fact, a bill (S. 2926, 76th Cong., 1st sess.) asserting a claim for $1,975,000 representing the amount, with interest, which has been paid under the 1921 Act for roads and bridges has been referred, under Section 151 of the Judicial Code (28 U. S. C. 257), to the Court of Claims (S. Res. 288, 76th Cong., 3d sess., 86 Cong. Rec. 9097) where the matter is now pending. Plainly, under these circumstances, no occasion is presented for re-examination of this Court's decision in *Morrison* v. *Work*. Cf. *Brooks* v. *Dewar*, 313 U. S. 354, 359.

CONCLUSION

The decision of the court below is correct and presents neither a conflict of decisions nor a novel question of general importance. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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